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ALEXANDER L. STEVAS
CLERK

No. 80-1235

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SHEARN MOODY, JR.,

Petitioner,

v.

THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Throughout this litigation, respondents have studiously avoided the substantive issues and have sought to inflame the lower courts with irrelevant slurs and innuendos concerning petitioner's character. Consistent with this

pattern, respondents now oppose the petition for writ of certiorari based on ad hominem attacks and baseless claims that petitioner has inaccurately presented his case. Respondents also devote several pages of their brief to unrelated litigation in which petitioner has been involved.[1] Significantly, however, the Brief in Opposition is virtually bare of authority on the merits of the petition. It is thus critical that respondents' tactical smokescreen not be permitted to distract the Court from the important issues raised in the case.

I.

Respondents ask the court to deny certiorari based on an issue not decided by the courts below; namely, that the state court judgment was entitled to full faith and credit even if it was invalid. In support of this contention, respondents cite only a series of Fifth Circuit opinions, none of which consider the issue directly and most of which were decided on a summary basis. *See* Brief in Opposition at 8-9. Respondents' claim of a "firmly established rule" of course ignores the many decisions of this Court holding that there are exceptions to the full faith and credit principles; *see, e.g. Nelson v. George,* 399 U.S. 224 (1970) (penal judgments), *Griffin v. Griffin*, 327 U.S. 220, 228 (1946) (lack of procedural due process), *Cole v. Cunningham*, 133 U.S. 107 (1890) (fraud), particularly where, as here, the judgment sought

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[1] Respondents cite thirteen opinions in which petitioner has been a named party for the proposition that he has unjustifiably flooded the courts with litigation. Respondents neglect to point out that petitioner was plaintiff in only one of the thirteen cases, Moody v. Moody National Bank, 522 S.W. 7d 710 (1975). In the remainder, petitioner litigated in the capacity of a defendant or an intervenor in receivership proceedings which sought to strip him of his controlling share of a multimillion dollar insurance company.

to be enforced was unconstitutional or invalid. *See, e.g. Hanson v. Denckla*, 357 U.S. 235 (1958); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912). *Cf. Hood v. McGehee*, 237 U.S. 611 (1915) and *Fall v. Eastin*, 215 U.S. 1 (1909) (limited exceptions for judgments involving adoption and property titles).[2]

In any event, neither the District Court nor the Fifth Circuit considered the full faith and credit issue. Indeed, while respondents urged the district court to enforce the judgment, they never specifically raised the claim that even an invalid judgment is entitled to full faith and credit. Both the district court and the Fifth Circuit decisions rested exclusively on the holding that the *in rem* exception to the principles of *Donovan v. City of Dallas* should be extended and applied to petitioner's situation to hold the Alabama state court injunction valid. That is the issue presented by this petition. The full faith and credit question, even if it had been properly raised below and were of substance (which it is not, see cases cited *supra*), would at most require summary reversal and remand to the Fifth Circuit for decision of that issue. *See, e.g., United States v. United Continental Tuna Corp.*, 425 U.S. 164, 182 (1976); *Wood v. Strickland*, 420 U.S. 308, 326-7 (1975), *reh. denied*, 421 U.S. 921 (1975); *Scherk v. Alberto-Culver Co* 417 U.S. 506, 516 n. 9 (1974); *Logue v. United States*, 412 U.S. 521, 532-3 (1973); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-8 (1971);

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[2] Petitioner claimed the benefit of several of these exceptions below, particularly the "penal judgment" exception. *See, e.g., Nelson v. George, supra;* Huntington v. Attrill, 146 U.S. 657 (1892); The Antelope, 23 U.S. (10 Wheat) 66, 123 (1825). The lower court decisions discussed the merits only of the *Donovan* issue, which petitioner has presented to this court.

United States v. Estate of Donnelly,, 397 U.S. 286, 295 n. 5 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 156 (1967).

II.

Respondents' Brief in Opposition virtually concedes the correctness of petitioner's exposition of the lower court's departure from the Court's *Donovan* doctrine. Respondents do not contest that

(1) the lower courts enforced the Alabama judgment because of their determination that the injunction upon which it was based was valid;

(2) the lower courts upheld the validity of the injunction on the basis that the *in rem* exception to the *Donovan v. City of Dallas* rules applied;

(3) the *Allmon* case, although it might potentially have affected the Alabama receivership proceedings, was not *in rem*.

In support of their argument that the lower courts' expansion of the exception to *Donovan* was correct, respondents cite as sole authority the decisions of the Fifth Circuit and the Alabama Supreme Court *in the instant case*. *See* Brief in Opposition at 10-12. As the petition points out, such a radical and unsupported departure from the precedent established by this Court is not the province of lower courts. It should not be countenanced except by this Court.

III.

Without any explanation, respondents deny the existence of any conflict among the circuits concerning the issue petitioner raises. Respondents' description of and allegations concerning the background of the *Allmon*

litigation in no way changes the indisputable fact that it sought *in personam* relief; that is, damages and declaratory relief regarding the constitutional validity of certain Alabama receivership statutes. To the extent *Allmon* may have had a potential effect on the receivership, it was identical to the lawsuit at issue in *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979), which the Seventh Circuit nonetheless held to be *in personam*. *Id.* at 675 n.7. The decision in the instant case thus conflicts squarely with that court's decision in *Central States*, as well as the decisions of the district courts in *Mills v. Roanoke Ind. Loan & Thrift*, 70 F.R.D. 448 (W.D.Va. 1975) and *Slotkin v. Brookdale Hospital Center*, 357 F.Supp. 705 (S.D.N.Y. 1972).

IV.

Respondents argue that Moody "had absolutely no federally guaranteed right to participate in the *Allmon* litigation." Brief in Opposition at 15. Their contention, which was not seriously raised below, is utterly frivolous. This Court has long held that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971). *See also In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976) (expenditure to support cause is constitutionally protected).

V.

Throughout the Brief in Opposition respondents assert that petitioner has inaccurately presented the facts of the case. These assertions are patently baseless.

Comparison of petitioner's statement of the case with respondents' presentation reveals no fact differences. Petitioner's statement, if anything, is more complete. Noticeably absent from respondents' presentation is any description of the *Allmon* case. Respondents apparently wish to hide its *in personam* nature from this Court.

Respondents cite only one asserted "example" of inaccuracy. Brief in Opposition at 16. It is the statement in the petition that petitioner "moved to intervene in the receivership proceedings on a limited basis." Pet. at 4. That statement is precisely accurate.[3] The record of the receivership proceeding is unequivocal that petitioner moved to intervene in the receivership for the sole purpose of opposing liquidation and reinsurance of the insurance policies of Empire Life and to propose a plan of rehabilitation.[4]

The Alabama circuit court and the receiver refused to permit him to intervene on this limited basis, but instead requested him to agree to enter a full appearance, submit all potential legal claims in the receivership court, and agree to be bound by an injunction prohibiting his filing of any actions in other courts or jurisdictions. Petitioner declined to agree to this expansion of his limited appear-

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[3] Petitioner regrets the necessity to go beyond the record below to demonstrate the inaccuracy of respondents' own ex-record characterization of the Alabama receivership proceedings.

[4] Appendix 1, Complaint in Intervention. R. at 378-86.

ance[5] and the court denied the intervention motion.[6] Six months later the circuit court reversed itself at respondent's instance,[7] without any change in petitioner's position that he would only intervene in a limited manner.[8] Thus petitioner's statement was wholly accurate, and respondents' statements to the contrary are a blatant misrepresentation to the Court.[9]

CONCLUSION

This case presents a single issue, significant both to individual litigants such as petitioner and to the administration of justice in the state and federal courts. The brief of the Washington Legal Foundation, which has moved for leave to intervene as *amicus curiae*, demonstrates the national importance of the issue.[10] Respondents, through

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[5] Appendix 2, excerpts from Transcript of October 19, 1973.

[6] Appendix 3, excerpts from Decree of October 22, 1973. *See also* Appendix 2.

[7] Appendix 4, Petition for Reconsideration; Appendix 5, Order of April 8, 1974.

[8] Appendix 3, excerpts from Decree of October 22, 1973.

[9] Petitioner notes that this misrepresentation could not have been an innocent error. James W. Webb, counsel for the Respondent Commissioner before this Court, was present at the hearing on petitioner's limited intervention motion. He personally urged the court to require petitioner to enter a full appearance if he wished to intervene, which petitioner refused to do.

> . . . we have no objection to Mr. Moody coming in to this Court, but if he comes in I want him to be enjoined from proceeding in any other court. . . .

See Appendix 2.

[10] The issue is not only important generally to the proper relationship between State and federal courts, which the Court balanced in *Donovan*, but more specifically to the rights of litigants

[footnote continued]

misrepresentations and invective, have attempted to distract the Court from the merits. Petitioner respectfully submits that this Court should pierce respondent's smokescreen, and consider the substance of the open question which the decisions of the courts below have raised.

Respectfully submitted,

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when an insurance company falls under a state receivership. Thirty-two other states have receivership statutes identical or nearly identical to the Alabama provision that spawned the invalid injunction here. Appendix 6. Allowing the decision below to stand would encourage a rash of State court injunctions, like that here, going beyond *Donovan*-permitted bounds. The National Association of Insurance Commissioners' Insurers' Supervision, Rehabilitation, and Liquidation Model Act, Article I, § 5(A)(6), provides for injunctions against "the institution or further prosecution of any actions or proceedings." NAIC makes no distinction between in rem and in personam actions, or between state and federal actions.

APPENDIX 1

CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT
OF ALABAMA
(IN EQUITY)

CASE NO. 171-687

STATE OF ALABAMA, EX REL,
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,

PLAINTIFF,

VS.

EMPIRE LIFE INSURANCE COMPANY
OF AMERICA, an Alabama Corporation,

DEFENDANT,

SHEARN MOODY, JR.,

INTERVENOR AS A DEFENDANT.

COMPLAINT IN INTERVENTION

Intervenor, Shearn Moody, Jr. shows the Court as follows:

1. That Shearn Moody, Jr. is the largest single stockholder of Empire Life Insurance Company.

2. That pursuant to an Order entered by this Court on June 29, 1972, John G. Bookout, Commissioner of Insurance of the State of Alabama, was appointed as Receiver to "continue to operate the business of the said Empire Life Insurance Company of America to the end

of rehabilitating said Company under the further orders and directons of the Court." (Paragraph 3, Decree for Injunction and Appointment of Receiver).

3. That on December 19, 1972, the said Receiver filed with the Court a "Petition for Instruction and Approval of Plan of Rehabilitation for Empire Life Insurance Company of America", with a plan for such rehabilitation set forth.

4. That on January 19, 1973, the said Receiver filed a second Petition for Instruction and Approval of Plan of Rehabilitation for Empire Life Insurance Company of America with another separate plan of rehabilitation set forth.

5. That this Honorable Court on January 26, 1973, entered an Order to receive definite offers or proposals with respect to the assets and estate of said Empire Life Insurance Company of America and for a notice to be published in various newspapers and The Wall Street Journal entitled, "NOTICE OF PROPOSALS FOR THE PROPERTY, ASSETS AND ESTATE OF EMPIRE LIFE INSURANCE COMPANY OF AMERICA *OR FOR ITS REHABILITATION*". (Emphasis added).

6. That this Honorable Court on February 15, 1973, entered an Order setting aside the previous Order of January 26, 1973.

7. That on May 10, 1973, the said Receiver filed a Petition for Instructions Regarding Reinsurance and sought, in part, the Court's authorization for the Receiver to seek Federal and State regulatory clearance for an advertisement extending an invitation for proposals for a total reinsurance of all business of Empire Life Insurance Company of America, nor any of its counsel of record in this cause; and no notice of such Petition was given to the

stockholders or creditors of Empire Life Insurance Company of America.

8. That this Honorable Court on May 10, 1973, entered an Order which authorized the Receiver to forthwith petition all applicable Federal and State regulatory agencies for approval of an advertisement to extend an invitation for proposals for a total reinsurance of all business and payment of all creditors of Empire Life Insurance Company of America. A copy of such Order was not sent to defendant or any of its counsel of record in this cause.

9. That on September 6, 1973, the said Receiver filed with the Court an Ex Parte Petition for Instructions Regarding Reinsurance, requesting that this Court enter an Order authorizing the Receiver to advertise and extend an invitation for proposals for a total reinsurance of all business of Empire Life Insurance Company of America and payment of all valid and approved claims of creditors. Such petition was supported by a Resolution, dated August 29, 1973, executed by the Commissioners of Insurance, Superintendents of Insurance, and Ancillary Receivers from affected states which authorized the Receiver to file such petition with this Court. However, a copy of such petition and resolution was not served on the defendant in this cause, Empire Life Insurance Company of America, or any of its counsel of record in this cause. Further, no notice of such petition was given to the stockholders or creditors of Empire Life Insurance Company of America. In addition, no hearing was had with respect to such petition.

9. That this Honorable Court on September 12, 1973, entered an Ex Parte Order, based, in part, upon the Resolution of the affected Commissioners of Insurance,

Superintendents of Insurance, and Ancillary Receivers, authorizing the Receiver to advertise and extend an invitation for proposals for a total reinsurance of all the business of Empire Life Insurance Company of America and set forth the form of notice to be published which notice did not set forth "or for its rehabilitation". Copies of said Order were not sent to defendant, Empire Life Insurance Company of America, or any of its counsel of record. Further, copies of said Order were not disseminated to stockholders or creditors of Empire Life Insurance Company of America.

WHEREFORE, PREMISES CONSIDERED, Intervenor prays that this Court set aside and hold for naught its Orders issued on May 10, 1973, and September 12, 1973, or in the alternative that this Court order an immediate stay of such Orders until all interested persons are notified and a full hearing is conducted with respect to plaintiff's Petition for Instructions regarding reinsurance filed with the Court on September 6, 1973, and as grounds, submits the following:

A. The total absence of notice to defendant, and its policyholders, creditors and stockholders and the ex parte nature of such orders constitutes a denial of due process guaranteed by the Fourteenth Amendment to the Federal Constitution. The original Order of the Court dated June 29, 1972, entered after a full hearing, provides for the appointment of a Receiver for the rehabilitation of defendant. The Court has now embarked upon a scheme of liquidation of defendant without any notice to defendant and without conducting any additional hearings or inquiries whatsoever. There is no factual justification for defendant's liquidation.

B. The total absence of notice to Defendant's creditors is in violation of Sections 636, 638 and 650 of the

Alabama Insurance Code, Act No. 407, Acts of Alabama 1971.

C. The total absence of notice to Intervenor, and other stockholders of defendant, and the ex parte nature of the Orders of May 10, 1973, and September 12, 1973, is in violation of the procedures set forth in the Alabama Insurance Code, Act No. 407, Acts of Alabama 1971.

D. There is no evidence in the record to support the Receiver's Petition to accept orders for the liquidation or reinsurance of defendant. The last hearing conducted by the Court relative to the overall affairs of defendant resulted in the June 29, 1972 Order for the appointment of a receiver for defendant's rehabilitation.

E. Based on this Court's Ex Parte Order of September 12, 1973, advertisements have been and are being published in various newspapers and The Wall Street Journal to solicit bids or proposals for the reinsurance of the entire business of defendant, as well as all the property, assets, and estate of defendant, thereby causing irreparable harm and damage to the business reputation of defendant, its policyholders, creditors and stockholders.

F. The Order of September 12, 1973, represents a complete abandonment of the Court's original determination to rehabilitate Empire Life Insurance Company of America as announced in the Order of June 29, 1972. The Court has now embarked upon a course leading to the complete liquidation of defendant without having given defendant's stockholders notice or an opportunity to be heard with respect to its divestiture.

G. The Court's requirement of a $15,000,000 capital surplus unreasonably limits the number of companies eligible to bid on defendant's assets, thereby affecting the

value of Intervenor's stock. Such figure was apparently determined arbitrarily without giving defendant's stockholders an opportunity to be heard or to prevent evidence indicating the impropriety of such a restrictive figure.

SIROTE, PERMUTT, FRIEND & FRIEDMAN, P.A.

By _____

E. M. Friend, Jr.

_____

Thomas R. Beech

APPENDIX 2

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT IN AND FOR
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

CASE NO. 171-687

STATE OF ALABAMA, ex rel
JOHN G. BOOKOUT,
Commissioner of Insurance,

COMPLAINANT,

VS.

EMPIRE LIFE INSURANCE COMPANY
OF AMERICA, an Alabama corporation,

RESPONDENT.

CAPTION

THE ABOVE ENTITLED CAUSE came on to be heard before the Honorable William C. Barber, Judge, commencing on the 19th day of October, 1973, at or about 2:00 o'clock P.M. when the following proceedings were had and done:

APPEARANCES:

MR. JAMES W. WEBB, of the firm of Alton, Leavell, Morgan and Webb, Attorneys at Law, 650 South McDonough Street, Montgomery, Alabama, 36102, appearing for the Receiver.

MR. CHARLES BARNES, Assistant Attorney General, State of Alabama, Montgomery, Alabama, appearing for the Receiver.

MR. E. M. FRIEND, JR. and MR. JAMES HARRIS, of the firm of Sirote, Permutt, Friend and Friedman, Attorneys at Law, First Federal Building, Birmingham, Alabama,

PROCEEDINGS:

(Whereupon the following proceedings were held in the Court's Chambers.)

THE COURT: All right, let's make it formal. Let the record show that there are four motions for consideration and determination by the Court set for this afternoon.

The first motion in order of time the Court elects to take up is a motion to intervene filed by Shearn Moody, Jr., on October 12, 1973

* * *

MR. WEBB: Your Honor, we offered, as I said, we understood Mr. Moody's circumstances as a very peculiar situation because of the stock situation of this company. He owns something like, I believe, 98% of the voting stock. He is the principal stockholder and Chairman of the Board and President of the company, and certainly he is affected by the proceedings of this Court.

We realize, too, that there are numerous cases that says the stockholder has no standing in this Court, but we, the Commissioner, as Receiver, would offer no objection to him coming in. We would like for it to be on a limited basis, and we would also ask the Court to restrict him in the same manner that it has restricted the other officers of the Defendant corporation from proceeding outside the receivership court, that is by bringing any actions in other courts adverse to the receivership court, that is by bringing any actions in other courts adverse to the receivership court.

THE COURT: Are you willing to come in under that restriction?

* * *

MR' BEECH: Your Honor, I don't think it's possible for us to come in on that proposition.

* * *

I don't see how you can limit him and enjoin him from pursuing other remedies in other states in other forms until this Court rules on the jurisdiction question which we filed before the Court trying to obtain jurisdiction over all of the commissioners in one place because we have to deal with them in Arkansas and we have to deal with them in Montana and Texas, certainly.

* * *

THE COURT: . . . What I'm trying to do is to assist, if I can, in the rehabilitation of the company, but I don't want—I want friends in camp, I don't want people who are going to take an adversary position while they're in this case as parties. The purpose of which said case is to rehabilitate the company, to be allowed to take some adversary position, and that is the reason why the original order was made barring that sort of activity. If he is going to get into the picture and get into the interworkings of the rehabilitory efforts and from that position he is going to fire into the camp, so to speak, to project his own personal interests, and I imagine that is what he's in here for, I would think so, if he didn't have a personal interest I don't suppose he would want to intervene. Now these people that are outside that are going to bid, they don't yet have any personal interest but he does, his is already established. So I think it's only fair for him to take the

same posture and same position that they do relative to his dealings with the company.

Now if he wants to stay on the outside and take pot shots he has got a perfect right to do it, but to put him in here and then let him file adversary actions, I don't think that is—I think it's anomalous and I won't permit it, I will tell you that now.

* * *

MR. WEBB: But we don't want to be harassed, but we particularly don't want him filing any suits outside of this, out of this court. We want them entered right here.

MR. FRIEND: We would be delighted for everything to be administered here if you will bring all of the insurance commissioners and everything else before us and then let Judge Barber control the whole thing, but I don't see how, in view of the fact that other actions being taken by other insurance commissioners in other states, that Mr. Moody should not be in a position to defend himself in other states, if he came in—

* * *

MR. WEBB: Your Honor . . . what I am seeking here, as I have said, we have no objection to Mr. Moody coming into this Court, but if he comes in I want him to be enjoined from proceeding in any other court in a disruptive manner so as to try to disrupt the proceedings and the orderly administration of this receivership as it's presently proceeding in this Court, and I could cite examples, they're hearsay at the present time, but this is really what I'm driving at.

MR. FRIEND: Mr. Webb, I ask you the question whether your interest and perhaps the Court's wouldn't be better served by having Mr. Moody in here because it

seems to me that if he is before this Court than the Court and you, through the Courts, have much more ability and authority to control anything that you consider to be disruptive than if he is outside the Court?

MR. WEBB: As I said, Mr. Friend, we had no objection, but I want the control to begin with, and with that understanding that he's not going to, for example, seek in concert with members of the—members of the Board of Directors of NICOA to file an action in Federal Court in North Dakota seeking to disrupt the proceedings in this Court. This type of thing, and if I have to bring in testimony to the effect that has been done, I will bring it in, but this is the only thing I want to know, if he is going to come into this Court, then I want him subject to that same thing, that he is subjecting himself to the jurisdiction of this Court, and he will be enjoined from proceeding outside of this Court in a matter in any court, either he or in concert with others, so as to disrupt this proceeding.

THE COURT: Does anybody else want to talk?

MR. BEECH: Your Honor, we couldn't live with that in the present posture of this case until the Court rules on the jurisdiction over all of the commissioners and issuing an order restricting their activities in the same manner that Mr. Webb is implying that Mr. Moody is acting and going to be restricted. That is an impossible limitation on Mr. Moody.

* * *

THE COURT: All right, Gentleman, are y'all through with your arguments and statements on the motion to intervene as a Defendant that is filed by Shearn Moody, Jr. on October the 12th, 1973? Then let the record show that the motion is denied.

APPENDIX 3

CIRCUIT COURT, TENTH JUDICIAL
CIRCUIT OF ALABAMA
EQUITY DIVISION

CASE NO. 171-687

STATE OF ALABAMA, EX REL
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE

PLAINTIFF

VS.

EMPIRE LIFE INSURANCE
COMPANY OF AMERICA, an
Alabama corporation

DEFENDANT

DECREE RE: MOTIONS

This cause came on to be heard and was heard on Friday, October 19, 1973 in chambers by the Court and present were counsel of record for Plaintiff, Defendant and Shearn Moody, Jr. The purpose of the hearing was for the presentation and hearing of the following four petitions or motions . . . .

4. "Motion To Intervene As A Defendant" as filed on October 12, 1973 by Shearn Moody, Jr.

The Court heard arguments and statements, at length, by the several counsel and its findings are set forth hereinafter.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows: . . .

FOUR: The "Motion To Intervene As A Defendant" as filed on October 12, 1973 by Shearn Moody, Jr. is disallowed, denied and overruled.

DONE and ORDERED this the 22nd day of October, 1973.

CIRCUIT JUDGE IN EQUITY SITTING

cc: Hon. Charles Barnes
Hon. Jim Webb
Hon. Ed Friend, Jr.
Hon. Thomas Beech
Hon. Murray Sams, Jr.
Hon. Francis Hare
Hon. Ark Monroe, III
Hon E.V. Omholt
Hon. J.M. Jackson
Hon. J. O. Wigen
Hon. Joe B. Hunt
Hon. Clay Cotton

APPENDIX 4

CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT
OF ALABAMA
EQUITY DIVISION

CASE NO. 171-687

STATE OF ALABAMA, EX REL,
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,

PLAINTIFF,

VS.

EMPIRE LIFE INSURANCE COMPANY
OF AMERICA, an Alabama Corporation,

DEFENDANT,

and

SHEARN MOODY, JR.

INTERVENOR

PETITION FOR RECONSIDERATION OF MOTION FOR INTERVENTION

COMES NOW, John G. Bookout, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America, an Alabama Corporation in receivership, and petitions this Honorable Court for reconsideration of that decree heretofore rendered on the 22nd day of October, 1973, denying and overruling the motion to intervene as a defendant heretofore filed on October 12,

1973, by Shearn Moody, Jr., and as grounds for said petition sets down and assigns the following:

(1) At the time the motion of Shearn Moody, Jr., an applicant for intervention as a party defendant, was filed, the basis of his complaint was that that Order heretofore entered on September 12, 1973, for advertisement of reinsurance was premature in that said advertisement proposed plans and proposals for reinsurance contemplating and subject to further hearings and consideration.

(2) That subsequent to the said Order of October 22, 1973, the Court and your Receiver have received proposals of reinsurance which now change and alter the positions heretofore taken by the Receiver and materially affect the status of the receivership and rehabilitation efforts of the Receiver.

(3) Shearn Moody, Jr., an applicant for intervention as a party defendant is recognized as President and Chairman of the Board of Directors for defendant corporation in receivership and the largest single stockholder of outstanding common capital stock of Empire Life Insurance Company of America and that as such Shearn Moody, Jr., does have an interest in said company over and above that interest possessed by other persons.

WHEREFORE PREMISES CONSIDERED, John G. Bookout, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America, consents to intervention of Shearn Moody, Jr., as a party defendant in this cause and prays that this Honorable Court will reconsider its decree heretofore entered on October 22, 1973, denying the motion to intervene. Your petitioner further prays that this Court will enter such orders as it

may deem necessary granting to the said intervenor status as a party.

Respectfully submitted,

John G. Bookout
Commissioner of Insurance
Receiver of Empire Life Insurance
Company of America

By: _____
James W. Webb
Attorney for Receiver

Of Counsel:

James W. Webb
138 Adams Avenue
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition has been served on Honorable E. M. Friend, Jr., Sirote, Permutt, Friend and Friedman, P.A., Attorney for Defendant, First Federal Building, First Avenue and Twenty-first Street, Birmingham, Alabama 35203 by depositing a copy in the United States mail postage prepaid this the 8th day of January, 1974.

James W. Webb
Counsel

APPENDIX 5

IN THE CIRCUIT COURT FOR
THE TENTH JUDICIAL CIRCUIT
OF ALABAMA – IN EQUITY

CASE NO. 171-687

STATE OF ALABAMA, EX REL.
JOHN G. BOOKOUT, COMMISSIONER
OF INSURANCE,

Plaintiff,

v.

EMPIRE LIFE INSURANCE
COMPANY OF AMERICA, an
Alabama corporation,

Defendant.

ORDER

This matter coming on to be heard this date on the petition of the Honorable John G. Bookout, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America, for reconsideration of motion for intervention filed on October 12, 1973, by Shearn Moody, Jr., it is hereby

ORDERED, ADJUDGED and DECREED that the Court's prior decree of October 22, 1973, denying the motion of Shearn Moody, Jr. to intervene is hereby overruled and the motion to intervene is hereby granted; it is further

ORDERED, ADJUDGED and DECREED that the complaint of intervenor is set down for hearing on the

13th day of February, 1974, at 9:00 A.M. and the Receiver is given ten days from the date of this order to file its answer to the complaint of intervenor.

Entered and ordered in Birmingham, Alabama, this the 8th day of January, 1974.

CIRCUIT JUDGE IN EQUITY SITTING

COPIES TO:

Hon. Ed Friend, Jr.
Hon. Thomas Beech
Hone. Murray Sams, Jr.
Hon. Francis Hare
Hon. Herbert Crook
Hon. Ted James
Hon. Melvin Kammerlohr
Hon. Allan Horne
Hon. Robert Alphson
Hon. John Bookout
Hon. Ark Monroe, III
Hon. E. V. Omholt
Hon. J. M. Jackson
Hon. J. O. Wigen
Hon. Joe B. Hunt
Hon. Don Odum
Hon. Tom McFarling

APPENDIX 6

Alabama Code tit. 27, §27-32-5(b) (1977) provides (emphasis added):

> (b) The court may, at any time during a proceeding under this chapter, issue such other injunctions or orders *as may be deemed necessary to prevent* interference with the commissioner or the proceeding, or waste of the assets of the insurer, or *the commencement or prosecution of any actions,* or the obtaining of preferences, judgments, attachments or other liens or the making of any levy against the insurer or against its assets or any part thereof.

Twenty-four other states have virtually identical provisions:

Alaska Stat. §21.78.030(b) (1966)
Ariz. Rev. Stat. Ann. §20-614(B) (1975)
Ark. Stat. Ann. §66-4804(2) (1980)
Del. Code Ann. tit. 18, §5904(b) (1975)
Fla. Stat. Ann. §631.041(2) (West 1972)
Ga. Code Ann. §56-1414(2) (1977)
Haw. Rev. Stat. §431-670(b) (1976)
Idaho Code §41-3305(2) (1977)
Me. Rev. Stat. tit. 24-A, §4362(2) (1974)
Md. Ann. Code art. 48A, §135(2) (1979)
Minn. Stat. Ann. §60A.04(24) (West 1968)
Nev. Rev. Stat. §696B.270(2) (1977)
N.J. Stat. Ann. §17.30C-5(b) (West Supp. 1980)
N.Y. Ins. Law §528(2) (McKinney 1966)
N.C. Gen. Stat. §58-155.19(b) (1975)
Okla. Stat. Ann. tit. 36, §1904(B) (West 1976)
Or. Rev. Stat. §734.140(2) (1979)
S.D. Compiled Laws Ann. §58-29-12 (1978)
Tenn. Code Ann. §56-9-105 (1980)
Tex. Ins. Code Ann. tit. 21-28, §4(b) (Vernon 1963)
Utah Code Ann. §31-28-19(2) (1974)

Wash. Rev. Code Ann. §48.31.200(2) (1961)
W. Va. Code §33-10-4(b) (1975)
Wyo. Stat. §26-33-104(b) (1977)

Eight additional states' statutes, in slightly different form, empower courts to issue injunctions or orders deemed necessary to prevent ". . . the institution or prosecution of any actions or proceedings." They are:

Cal. Ins. Code §1020(c) (West 1972)
Conn. Gen. Stat. §38-425(a)(6) (1981)
Ind. Code Ann. §27-9-1-4(6) (Burns Supp. 1980)
Ky. Rev. Stat. §304.33-050(f) (1981)
Mont. Rev. Codes Ann. §33-2-1309(f) (1979)
N.H. Rev. Stat. Ann. §402-C:5(f) (Supp. 1979)
40 Pa. Cons. Stat. Ann. §221.5(a)(vi) (Purdon Supp. 1980)
Wis. Stat. Ann. §645.05(f) (1980)